APPENDIX 2

The following contains excerpts and pages from the article:

"THE LAW IS WHATEVER THE NOBLES Do": UNDUE PROCESS AT THE FCC
Barbara Esbin and Adam Marcus, at The Progress & Freedom Foundation, 2008. COMMLAW CONSPECTUS, Vol. 17, 2009.

This article discusses a FCC Order against Comcast that resulted, along the lines of analysis and argument in this article, in the court action in favor of Comcast: In *Comcast Corp. v. FCC*, 600 F.3d 642 (2010), the D.C. Circuit Court of Appeals held that the FCC failed to justify its exercise of ancillary authority to regulate Internet service providers' network management practices. For an issue to fall within an agency's authority, the agency need only have ancillary authority—a sufficient statutory support requesting the agency at least take action in the first instance of the issue. Here, the Court did not find a sufficient statutory basis under the Communications Act of 1934 for the FCC's mandate to regulate the behavior of Internet service providers.

The Court relied on a two-part test for ancillary authority, laid out in *Am. Library Ass'n v. FCC*, 406 F.3d 689: A commission may exercise ancillary authority only if "(1) the Commission's general jurisdictional granted under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." (Emphasis added.)

In addition, as summarized in the TechKnowledge blog: (emphasis added):

> In *City of Arlington v. FCC*, 133 S.Ct. 1863 (2013), the Supreme Court held that administrative agencies are entitled to Chevron deference when they interpret the scope of their statutory authority (or "jurisdiction")…. It has particular relevance for the Federal Communications Commission (FCC), however, which had relied on its ancillary jurisdiction to extend traditional common carrier regulations to the Internet.
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> To the extent there was any lingering doubt, City of Arlington clarified that the FCC cannot rely on ancillary jurisdiction (also known as ancillary authority) to impose regulations that would (1) exceed the statutory boundaries of the Communications Act or (2) contradict a specific provision within the Act.
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> The Supreme Court's clarification in Arlington dictated the DC Circuit's decision vacating the net neutrality anti-blocking and anti-discrimination rules earlier this week. (See Verizon v. FCC, No. 11-1355 (DC Cir. 2014)) The broadband access provided by Internet service providers (ISPs) is classified as an "information service" under the Communications Act, and the Act expressly prohibits the FCC from regulating information service providers (e.g., ISPs) as common carriers. The court found that the FCC lacked authority to enact the anti-blocking and anti-discrimination rules, because they constituted traditional common carrier requirements and thus contravened a statutory mandate.

From: “THE LAW IS WHATEVER THE NOBLES Do": UNDUE PROCESS AT THE FCC Barbara Esbin and Adam Marcus, at The Progress & Freedom Foundation, 2008. COMMLAW CONSPECTUS, Vol. 17, 2009:

(Underlining added)

p. 1:

> Our laws are not generally known; they are kept secret by the small group of nobles who rule us. We are convinced that these ancient laws are scrupulously administered; nevertheless it is an extremely painful thing to be ruled by laws that one does not know./1
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> 1/ FRANZ KAFKA, *The Problem of Our Laws*, in THE COMPLETE STORIES 437 (Willa & Edwin Muir trans., Nahum Glazer ed., 1971).
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pp. 621-

> IV. UNDUE PROCESS
> * * * *
> …. This Part examines how the Commission chose to exercise its purported jurisdiction. The FCC alternately claims that the Internet Policy Statement is enforceable and that it can simultaneously announce new rules and imposes them in an adjudicatory proceeding. Each of these claims is examined in turn.
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> A. An Agency Cannot Vindicate Policy Not Codified in a Statutory Mandate or Rule
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> Federal agencies can carry out their responsibilities by either rulemaking or through adjudication.”503/ The Administrative Procedure Act ("APA") defines rulemaking as the "process for formulating, amending, or repealing a rule."504/ A rule is "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . .”505/ In contrast, adjudication is the process through which an order is formulated, and an "order" is a "final disposition" in "a matter other than rule making.”506/ In other words, under the APA, any final agency action that is not labeled rule- making is considered an adjudication. In terms of rulemaking:
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> When an agency wishes to promulgate a rule, the default position under the Administrative Procedure Act ... requires public notice, an opportunity for comment, and

the issuance of a "concise and general statement of basis and purpose." The resulting documents are called "legislative rules" because they are capable of binding with the force of statutes.507/

Agencies can also issue interpretive rules and policy statements, which are collectively referred to as non-legislative rules.508/ Non-legislative rules are exempt from notice-and-comment requirements and can be made effective immediately upon publication in the Federal Register509/ The Attorney General's Manual on the Administrative Procedure Act defines interpretive rules as "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."510/

503/ See, e.g., John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 895 (2004).

504/ 5 U.S.C. § 551(5) (2006).

505/ § 551(4) (emphasis added).

506/ § 551(6)-(7).

507/ *Manning*, supra note 503, at 893.

508/ This Article uses the simpler term "interpretive" instead of the APA's "interpretative." 5U.S.C. §553(b)(3)(A).

509/ § 553(b).

510/ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 15 (1947),
reprinted in FEDERAL ADMINISTRATIVE SOURCEBOOK 33, 30 n.3 (William F. Funk et al, eds., 2000), available at http://www.law.fsu.edu/library/admin/I947cover.html. The Attorney General's Manual on the Administrative Procedure Act was intended "as a guide to the agencies in adjusting their procedures to the requirements of the Act" and was originally produced by George T. Washington, the Assistant Solicitor General, who had assisted with the drafting of the Act. Id. at 38; see *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 n.17 (D.C. Cir. 1974) ("The Attorney General's Manual is entitled to considerable weight because of the very active role that the Attorney General played in the formulationand enactment of the APA.").

In contrast, policy statements are defined as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.511/ Note that "legislative rules, interpretive rules, and policy statements all may involve interpretation of a statute. Therefore, sometimes an agency pronouncement can properly be characterized both as an interpretation and a policy statement."512/ However, there is an important difference between a general statement of policy containing an interpretation and an interpretive rule. As Professor John Manning explains:

The central inquiry in all nonlegislative rule cases is this: Is the agency document, properly conceived, a legislative rule that is invalid because it did not undergo notice-and-comment procedures, or a proper interpretative rule or general statement of policy exempt from such procedures? ...[I]f an agency seeks to specify its regulatory intentions in a legally operative way (without notice-and-comment rulemaking), it must be able to defend the resultant document as an "interpretive rule"--something defensible as an interpretation rather than as an exercise of delegated lawmaking authority. In practice, this framework requires the agency to show that the document in question merely implements policies already established by more formal means in statutes or legislative regulations. An agency cannot rely on (binding) interpretative rules to break new policymaking ground.513/

The distinction between a valid policy statement and an invalid legislative rule "turns on an agency's intention to bind itself to a particular legal position."514/ Although general statements of policy are generally classified as non-legislative rules, they are not binding; only interpretive non-legislative rules are binding. The D.C. Circuit has held that a general statement of policy cannot "create[] a new regime" in which the agency "bases enforcement actions on the policies or interpretations formulated in the document."515/ The D.C. Circuit has [continued]

511/ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, supra note 510 at 30 n.3.

512/ JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 75-76 (2006); see *Presbyterian Med. Ctr. of the Univ. of Pa. v. Shalala*, 170 F.3d 1146, 1147, 1150-51 (D.C. Cir. 1999) (holding that a Department of Health and Human Services rule that required parties seeking Medicare reimbursement to provide contemporaneous documentation was a permissible interpretative rule); *Nat'l Latino Media Coal. v. FCC*, 816 F.2d 785,

788-89 (D.C. Cir. 1987) (holding that a decision by the FCC to award telecommunications by a lottery in case of a tie among the applicants was a permissible interpretative rule).
513/ *Manning*, supra note 503, at 917, 923-24.
514/ *U.S. Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994).

515/ *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021-24 (D.C. Cir. 2000) ("If an
agency acts as if a [general statement of policy] issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document . . . [then] it should have been, but was not, promulgated in compliance with notice and comment rulemaking procedures.").

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also found that "[t]he real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the [APA] authorizes to contain only documents 'having general applicability and legal effect.'"516/

To understand the FCC's actions in the Comcast P2P Order one must understanding the role of the Internet Policy Statement. The FCC's action rests exclusively on the its claimed authority to directly vindicate and enforce federal policy against providers of broadband Internet access services."517/ ….

516/ *Brock v. Cathedral Bluffs Shale Oil Co*., 796 F.2d 533, 539 (D.C. Cir. 1986) (quoting 44 U.S.C. § 1510 (1982) (emphasis added)); see 5 U.S.C. § 552(a)(1)(D) (2006).

517/ See *Comcast P2P Order*, supra note 9, 13-15.

…. The Internet Policy Statement has not been published in the Code of Federal Regulations- it has not even been published in the Federal Register. The Internet Policy Statement is thus clearly not a legislative rule. Even if the FCC's repeated statements that the Internet Policy Statement did not establish rules were ignored, the Internet Policy Statement cannot be properly classified as an interpretive rule either.
Agencies can issue interpretive rules to "resolve ... ambiguities" or to transform a "vague ... duty or right into a sharply delineated duty or right.530/ Interpretive rules cannot be used to make new laws, rights, and duties. 531/ Accord- [continued]

530/ *Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994).

531/ See, e.g., *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) ("Ultimately, an interpretative statement simply indicates an agency's reading of a statute or a rule."); Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) ("[I]f by its action the agency intends to create new law, rights or duties, the rule is properly considered to be a legislative rule."); Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952) ("Generally speaking, . . . 'regulations', 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.").

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ingly, courts have developed various tests to determine if an agency's classification of a document as an interpretive rule is proper. If the rule invokes "specific statutory provisions, and its validity stands or falls on the correctness of the agency's interpretation of those provisions," it may be deemed a proper interpretive rule.532/ Similarly, if the justification for the rule consists of "reasoned statutory interpretation, with reference to the language, purpose and legislative history" of the relevant provision, the court is likely to view it as an interpretive rule.533/ Finally, if a rule "clarifies a statutory term" or "reminds parties of existing statutory duties," the court will consider it to be an interpretive rule.534/

There is, however, no ambiguity needing interpretation in the statutory provisions cited by the Commission with respect to either network management practices or consumer entitlements regarding broadband Internet access service.535/ The FCC previously stated, "Congress's clear intention, as expressed in the 1996 Act, [was] that [information services] remain 'unfettered' by federal or state regulation.536/….

532/ See United Techs. Corp. v. EPA, 821 F.2d 714, 719-20 (D.C. Cir. 1987).

533/ Gen. Motors Corp., 742 F.2d at 1565; see *United Techs. Corp*., 821 F.2d. at 720 (noting that an agency rule qualified as an interpretive rule because its validity "depended on whether or not the Agency had correctly interpreted congressional intent").

534/ *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992).

535/ See *Comcast P2P Order*, supra note 9, 13-15, 13,088 (McDowell, Comm'r, dissenting).

536/ IP-Enabled Services NPRM, supra note 47, 39 (emphasis added).

B. Rulemaking by Adjudication

The FCC majority justified its decision to enforce the Internet Policy Statement through adjudication by pointing out that courts have recognized that agencies have discretion to choose between proceeding by adjudication or rulemaking in carrying out their statutory responsibilities.542/ As a general matter [continued]

542/ As the Supreme Court had previously indicated, "[n]ot every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations." *SEC v. Chenery Corp*. (*Chenery II*), 332 U.S. 194, 202 (1947). However, "there may be situations where the [agency's] reliance on adjudication would amount to an abuse of discretion." *NLRB v. Bell Aerospace Co*. (*Bell Aerospace Co*.), 416 U.S. 267, 295 (1974). The 9th Circuit contemplated that "[s]uch a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective application." *Pfaffv. U.S. Dep't of Hous. & Urban Dev*., 88 F.3d 739, 748 (1996) (citing *Bell Aerospace Co*., 416 U.S. at 295); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981); *Patel v. INS*, 638 F.2d 1199, 1203-05 (9th Cir. 1980); *Ruangswang v. INS*, 591 F.2d 39, 44 (9th Cir. 1978).

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that is indisputably true, but only in a much more limited sense than is relied upon by the Commission. Although administrative agencies may choose to regulate through adjudication as well as rulemaking, the Supreme Court has shown a clear preference for rulemaking: "The function of filling in the interstices of [a statute] should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."543/ Proceeding via adjudication to "enunciate and enforce new federal policy"544/ is most appropriate for cases where "the administrative agency could not reasonably foresee" yet "must be solved despite the absence of a relevant general rule. 545/ Comcast's network management practices were not an instance where the FCC had to proceed by adjudication to address a problem that could not have been foreseen.546/

543/ *Chenery II,* 332 U.S. at 202.

544/ *Comcast P2P Order*, supra note 9, 28.

545/ *Chenery II*, 332 U.S. at 202-03.

546/ In March of 2005, the FCC took action against Madison River Communications, a
local exchange carrier, for intentionally blocking a specific application. See *In re* Madison River Communications, LLC and affiliated companies, *Order*, 20 F.C.C.R. 4295 (Mar. 3, 2005) [hereinafter *Madison River Order*]. Although Madison River was clearly subject to Title II, the basis on which the Commission premised its decree was not clear. The Internet Policy Statement was adopted in August 2005, more than two years before Free Press filed its complaint and four days shy of three years before the FCC adopted the Comcast P2P Order. Furthermore, by the time the FCC issued the Comcast P2P Order, Comcast had announced that it would migrate to protocol-agnostic network management techniques by the end of 2008. Press Release, Comcast Corp., Comcast and BitTorrent Form Collaboration to Address Network Management, Network Architecture and Content Distribution, (Mar. 27, 2008), available at http://www.comcast.com/About/PressRelease/PressReleaseDetail.ashx?PRID=740.

If the FCC wanted to ensure that Comcast would honor its announcement, the agency could have sought a consent decree with Comcast as it did with Madison River Communications. *In re Madison River Communications, LLC* and affiliated companies, Consent Decree, 20 F.C.C.R. 4296, I (Mar. 3, 2005). Seeking a consent decree rather than issuing an order would also likely have led to a quicker resolution. The Madison River consent decree was resolved less than a month after the letter of inquiry ("LOI") was issued. The LOI was is- sued on February 11, 2005. Id., 3. The decree was signed on March 3, 2005. *Madison River Order*, supra, at 4295. The *Comcast P2P Order*, by comparison, was issued nine months after the filing of the Free Press Complaint. Comcast P2P Order, supra note 9, at 13,028. And considering that in March of 2008 Comcast had already announced it would take the actions that the FCC eventually required of it, a consent decree would likely have been easy to secure.

…. As the **Supreme Court has found**, **"[i]n order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose."**547/ Although an agency is free to "announce new principals in an adjudicative proceeding," it

is improper to do so when the adverse consequences of reliance on past agency decisions are substantial, when liability is imposed for past actions taken in good faith reliance on prior agency pronouncements, **when the affected party has not had a full opportunity to be heard before the agency makes its determination**, or when fines or damages are involved.548/ *In Pfaff v. U.S. Department of Housing and Urban Development*, the Ninth Circuit held:

> **[R]eliance on adjudication would amount to an abuse of discretion… where the new standard ... departs radically from the agency's previous interpretation** of the law, **where the public has relied substantially and in good faith on the previous interpretation**, where fines or damages are involved, and **where the new standard is very broad and general in scope and prospective application.**549/

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547/ *Morton v. Ruiz*, 415 U.S. 199, 237 (1974).548/ *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 295-96 (1974).549/ *Pfaff v. U.S. Dep't of Hous. & Urban Dev*., 88 F.3d 739, 748 (9th Cir. 1996) (citing BellAerospace Co., 416 U.S. at 294-95).

pp. 646- 47:

The Due Process Clause of the U.S. Constitution states that "No person shall be ... deprived of life, liberty, or property, without due process of law….665/

665/ U.S. CONST. amend. V.

The D.C. Circuit has interpreted the **Due Process** Clause as "**prevent[ing]... deference from validating the application of a regulation that fails to give fair warning** of the conduct it prohibits or requires."666/

Even when an agency's interpretation of a statute is permissible, **"if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation."** 667/

For notice to be valid, the regulation must be "sufficiently clear to warn a party about what is expected of it."668/ As the court reasoned:

> Where...the regulations and other **policy statements** are **unclear**, where the petitioner's interpretation is reasonable, **and where the agency itself struggles to provide a definitive reading** of the regulatory requirements, **a regulated party is not** 'on notice' **of the agency's ultimate interpretation** of the regulations, and may not be punished. **[The agency] thus may not hold [the petitioner]** responsible in any way--either financially or in future enforcement proceedings—for the actions charged in this case.669/

666/ *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n,* 790 F. 2d 154, 156 (D.C. Cir. 1986).

667/ *SatelliteBroad.Co.,* 824 F.2d at 4.

668/ *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) ("[W]hen sanctions are drastic ... elementary fairness compels clarity in the statements and regulations setting forth the actions with which the agency expects the public to comply."); *see Radio Athens, Inc. v. FCC*, 401 F.2d 398,404 (D.C. Cir. 1968).

669/ *Gen. Elec. Co.,* 53 F.3d at 1333-34.

pp. 654 -55:

> It is Kafkaesque when the law is unknowable or revealed only in the actions of the nobility.709/
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> Policy choices and goals will differ over time-the desirability of regulation will wax and wane depending on economic conditions and the technological capabilities of networks-but the desirability of fair and predictable legal procedures to implement and enforce policy goals is constant.
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> Regardless of whether one believes that government-mandated norms of behavior for band-width providers710/ are good or bad policy, the only acceptable means by which government may impose such mandates is by remaining in conformity with the rule of law and by scrupulous compliance with its own procedures. Unlike the nobles in Kafka's parable, in our system of government, government officials do not "stand above the laws." If the government fails to comply with the rules constraining its behavior, how can it reasonably expect compliance with its mandates by regulated entities?
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709/ See *KAFKA,* supra note 1, at 437-38; Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz KaJka*, 3 PIERCE L. REV. 195, 198, 210 (2005) ("Kafka's vivid portrayals of faceless absurd bureaucratic institutions have resonated so deeply that his name has become an adjective .... (a) inescapability, (b) inscrutability, (c) incomprehensibility, and (d) inanity of situations.").

710/ Tim Wu, Op-Ed., OPEC 2.0, N.Y. TIMES, Jul. 30, 2008, at A17.